No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1963

THE AMERICAN OIL COMPANY, APPELLANT

v.

P. G. NEILL, ET AL

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS

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CITATIONS

Miscellaneous:

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COME NOW appellees above named and move the Honorable Supreme Court of the United States for order of dismissal on the grounds and for the reasons: (a) This matter is not taken in conformity to statute or to the rules of this Court; (b) No substantial federal question is presented by this matter; and (c) The judgment of the lower court rests on an adequate non-federal basis.

STATEMENT OF FACTS

Hereinafter the Atomic Energy Commission will be referred to as the AEC. The Idaho law pertinent to the so-called gasoline tax is hereunto appended. Idaho Code, Section 49-1201(2) imposes the duty of payment of the so-called gasoline tax upon Idaho licensed dealers.

The issue of whether dealers should pay Idaho the so-

called gasoline tax for gasoline consumed on Idaho highways on behalf of federal agencies hereto was submitted to the Comptroller General of the United States. He ruled in favor of Idaho by a letter dated November 5, 1951 (R. 74-77)[1], as well as by his decision which followed (R. 78-83).

The 1959 contract providing for the supplying of gasoline to the various governmental projects in Washington, Oregon, and Idaho is identical to years prior except that the parties changed one word, namely the word "included" to the word "excluded" in lines 3 and 4 (R. 250); and also there was a minor change in Item 64 (R. 260). In all other respects the contract is unchanged. No other discrimination appears between Idaho and Washington (R. 302) and Oregon (R. 282); further, the contract calls for payment of the so-called gasoline tax by all governmental agencies in Idaho (line 18, R. 252). However, appellant is suing for a refund for taxes paid to Idaho on one particular transaction; sale of gasoline to the Atomic Energy Commission (p. 1 of appellant's brief). No tax is paid in Utah (lines 3 and 4, R. 250).

The State of Idaho levied an charge for the gasoline sold under this 1959 contract. Payment was made under protest. This is a suit for reimbursement of the monies so paid under protest.

The following factual information herewith is given in order that the Court may more fully understand our position.

[1] Record references are to the typewritten record which has been filed with the jurisdictional statement.

The State of Idaho constructed and maintains several hundred miles of highway which are used by the general public and the AEC. Atomic City, near Arco, Idaho, and Arco, Idaho, itself, the headquarters of the AEC plant, have a combined population of 1703 persons, according to the 1960 census. Most of the workers live in or near Idaho Falls, Idaho and Blackfoot, Idaho and are transported by government buses 45 to 65 miles one way to their place of employment each day. A toll or a fee is charged each bus rider or passenger. Additionally a large fleet of other vehicles is maintained for general transportation over the many miles of highway used for the various functions of the AEC. Phillips Petroleum Company, ironically another oil company, is the major contracting company to supply maintenance and facilities to the Idaho AEC project. It also operates the aforementioned fleet of vehicles and buses (R. 381-383). The gas was ordered by Phillips Petroleum Company (R. 414).

QUESTIONS PRESENTED

The questions presented, which correctly were resolved by the Idaho Supreme Court, are:

1. In instances where the ultimate consumer is the government of the United States of America, can the state impose a motor fuel tax?

2. Must the State of Idaho furnish its highways free of charge to the federal government?

3. Does the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution invalidate this so-called tax as applied?

4. Where the United States and its agencies are required to make payments in lieu of taxes, may they discriminately pick and choose among the states or among the agencies within the state which payments will be made?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and additional statutory provisions which are relevant to the decision of this case, and the pertinent text of which is set forth in Appendix hereto, are Article VII, Section 17 of the Idaho Constitution (1 Idaho Code 174) and parts of the Idaho Code, as amended: 7A Idaho Code 40-2210; 9 Idaho Code 49-1210(d), 49-1212 and 42-1241; and the Atomic Energy Act of 1954, 68 Stat. 952, 42 U.S.C. 2208. The Judiciary and Judicial Procedure Act, 28 U.S.C. 1257(2) is quoted on page 4.

ARGUMENT

I

THIS APPEAL IS NOT TAKEN IN CONFORMITY TO STATUTE OR TO THE COURT RULES

This case cannot be taken as an appeal to this Court. To show jurisdiction therefor, there must be "* * * drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * *" 28 U.S.C. 1257(2).

To show jurisdiction for this appeal, appellant must show that the constitutionality of the taxing statute, itself, was questioned. *Wilson v. Cook*, 327 U.S. 479, 482, and cases cited therein.

The Idaho trial court clearly passed upon the constitutional construction of how the so-called tax was levied (R. 430):

> "The tax as *applied* to a sale made in Utah is a tax on interstate commerce and a violation of due process of law; in that it taxes a privilege of the plaintiff exercised outside of Idaho's jurisdictions." (emphasis supplied)
>
> "If it is a privilege tax on plaintiff, as I here hold, its *application* in this case is still unconstitutional." (emphasis supplied)

In overruling the trial court, the Idaho Supreme Court, *American Oil Co. v. Neill*, 86 Idaho ....., 383 P.2d 350, 361, stated:

> "It cannot be said that there is any discrimination between Utah Oil Refining Company as compared to a local 'dealer'; both are subject to an identical tax burden as it relates to the importation, receiving or sale of gasoline."

Appellant's sole argument in favor of jurisdiction is found in its casting the Idaho statute into little nitches so that it can take constitutional pot shots at the nitches.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THIS APPEAL, AND

III

THE JUDGMENT OF THE LOWER COURT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

A. The so-called tax in question is really a *toll* and therefore must be paid regardless of whether the gas is purchased by an individual or the federal government.

The so-called tax imposed by the Idaho statute actually is a toll or assessment for payment of construction, maintenance and use of the Idaho highways.

A tax in its general connotation is a charge for sovereignty; that is to say, monies collected from a tax levy will go to the payment or support of the government itself and generally is paid into the general fund.

Distinguished from a tax is an assessment or toll which has been defined as "right of a state to lay a reasonable charge for the use of the facilities furnished." *Tirrell v. Johnson*, 86 N.H. 530, 540, 171 Atl. 642, 646-647, aff'd 293 U.S. 533.

State highways are a commodity. Consumers of this commodity must pay their fair share of the cost.

If the Highway Department of the State of Idaho were a private corporation instead of an arm of the state government there is no question that the federal government would have to pay for the use of the facility or commodity.

The toll or assessment imposed by the State of Idaho for the construction, maintenance and use of its highways does not go for the support of the general government of Idaho and thus regardless of its connotation or description in the text of the statute, it nevertheless is not a tax in the general sense of the word. The monies collected are used strictly for road purposes. Idaho Code, Sections 40-2210, 49-1210(d), 49-1212 and 49-1241; Idaho Constitution, Article VII, Section 17.

The proper test is given us by *Tirrell v. Johnson*, supra, at 530, 171 Atl. at 648, as follows:

> "The charge must not interfere with the performance of the functions of the general government, and it cannot call upon that government to bear the expenses of the local government.
>
> "Neither of these propositions afford any ground for a conclusion that the state may be called to furnish gratis to the nation anything for the use of which it is entitled for compensation from all others. Equal treatment is of course required. Beyond that, any requirement that the state give free or exceptional services to the nation would be to deny the state the protection from federal imposition of precisely the same character as that condemned when attempted by state legislation against the general government."

And see *Aero Mayflower Transit Co. v. Comm'rs*, 332 U. S. 495, 505 and cases cited therein.

McCullock v. Maryland, 4 Wheat. 316, is not applicable in the case at bar simply because in that case the tax was a levy for the support of the general government. The Idaho statute makes no demand upon the federal government to contribute to the support of the Idaho government, and neither does it interfere with the function of the federal government. The money collected goes solely for highway purposes.

The federal government is to pay for what it wishes to buy or use.

> "In the final analysis the case has to do with a plain business proposition. The state says to all alike: If you wish to use that which I offer for

your use, you must pay the reasonable price which I ask for such use. Like the turnpike proprietor, the state is here a public servant bound to treat all alike. But also like him in its collection of compensation—it is not a tax gatherer.

"The fact, if it were a fact, that highways are provided by the state in the exercise of purely governmental power, would not deprive the state of authority to make a reasonable charge for their use. Nor does the circumstance that they are furnished by the state rather than by a private corporation give the federal government any preferential right to use them." *Tirrell v. Johnson*, supra, at 543, 171 Atl. at 648.

B. The Due Process Clause of the Fourteenth Amendment has no application in this case.

1. The State of Idaho is not attempting to tax a transaction which took place beyond its borders.

Appellant complains that a state has no power to tax transactions which occur outside its borders. The cases cited in support of this complaint are cases where a state tried to tax privileges or uses outside its borders. In *Union Refrigeration Transit Co. v. Kentucky*, 199 U.S. 194, the Court found that a property tax was invalid because the railroad cars permanently were located in another state. But that case is not authority for claiming a statute is unconstitutional where the goods are shipped into a state, and consumed there. Likewise, in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, a franchise tax was

levied for the privilege of doing business. The tax was found invalid because it was assessed against certain insurance contracts made in another state. In *McLeod v. Dilworth Co.*, 322 U.S. 327, a tax was held invalid because it was a sales tax imposed upon sales in another state.

The so-called tax in the case at bar is not imposed upon the passage of title or the solicitation in Idaho. The Idaho Court expressly disclaimed taxation for those particular privileges, *American Oil Company v. Neill*, 86 Idaho ....., 383 P.2d 350, 354. Nor must the State of Idaho cast its statutes into one particular form or limit it in favor of one particular incident to tax. A tax may be imposed when goods become a part of the common mass, or upon the use and enjoyment of the goods within the state, *Henneford v. Silas Mason Co.*, 300 U.S. 577. But this does not mean that title is the only taxable incident.

If considered a tax, regardless of how the contract for sale of gasoline is written this should not affect the state in taxing for the use of its highways so long as the state uses a taxable incident. Taxation goes to the stubstance of the matter and should not depend upon the legal niceties of the contracting parties, *Helvering v. Clifford*, 309 U.S. 331. Nor should the contractual subterfuge by the parties to shift the burden to the United States in an effort to make a tax seem a direct one, preclude this state from going to the substance of the matter. IMMUNITY CANNOT BE CONFERRED BY THE STROKE OF A PEN. *United States v. Township of Muskegon*, 355 U.S. 484; *Barwise v. Sheppard*, 299 U.S. 33; *Curry v. United States*, 314 U.S. 14 and *Scripto, Inc. v. Carson*, 362 U.S. 207.

Appellant's authorities absolutely fail to support their position. In spite of the host of cases dealing with gasoline taxes, appellant fails to cite any of these.

The privilege imparted in the case at bar could not possibly occur outside the State of Idaho. Instead, the collection of the toll or assessment for the use of the state highways occurred within the state. It is obvious that the use of the roads occurred within the state. The Due Process Clause has no application in the case at bar. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64; *Henneford v. Silas Mason Co.*, 300 U.S. 577; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86 and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542..

The so-called tax in question is not upon the passage of title or the privilege of the use of property outside Idaho, but is for the compensation for the maintenance, use and upkeep of Idaho highways. *American Oil Co. v. Neill*, 86 Idaho ____, 383 P.2d 350, 360; *Union Pacific R.R. Co. v. Riggs*, 66 Idaho 677, 685-687, 166 P.2d 926, 929-930; *Oregon Short Line R.R. Co. v. Pfost*, 53 Idaho 559, 574, 27 P.2d 877, 882; *Independent School District v. Pfost*, 51 Idaho 240, 246, 4 P.2d 893,898; *Tirrell v. Johnson*, 86 N.H. 530, 171 Atl. 641, aff'd 293 U.S. 533.

Appellant attempts to show the unconstitutionality of the statute based upon a hypothetical state of facts not supported by the record (where purchase of gasoline might be made from an unlicensed Idaho dealer). This Court has held that it does not pass upon hypothetical set of facts or abstract situations, *Wilson v. Cook*, 327 U.S. 479,

480; *Smiley v. Holm*, 285 U.S. 355, 375; *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116.

If this hypothetical question was raised before the Idaho Court, that Court also considered the issue as moot, for it did not pass upon the question. We therefore do not know what constitutional construction would have been placed upon this situation in Idaho, if any. The Supreme Court of Idaho also will not determine abstract or moot questions, *Jorgensen v. George*, 56 Idaho 81, 85, 50 P.2d 1, 2; *Stockyards Nat. Bank of Chicago v. Arthur*, 45 Idaho 333, 338, 262 Pac. 510, 512.

2. There is sufficient nexus between the State of Idaho and this appellant to make it a collector of the tax.

Any state may make a foreign corporation a collector of its taxes where there is sufficient nexus between the taxing state and the taxed corporation; *Scripto, Inc. v. Carson*, 362 U.S. 207; *General Trading Co. v. State Tax Commission*, 322 U.S. 335. In the *Scripto* case, supra, the petitioner's agent was in Florida but it had no other employees, buildings, bank account, or stock-in-trade there. Solicitation occurred by others who were residents of Florida called brokers or independent contractors. The sales were sent to Georgia, the petitioner's residence, for acceptance but in no case did money pass between the purchaser or petitioner. This Court ruled that there need only be a nexus "between a state and the person, property or transaction it seeks to tax." (362 U.S. 207 at page 211), and held the tax to be non-discriminatory. The tax was to complement the state sales tax and to prevent evasion.

According to the *Scripto* case, supra, the proper question to ask of the transaction in the case at bar is whether this case falls within the category of the *General Trading* case, supra, or the category of *Miller Bros. v. Maryland*, 347 U.S. 340.

The appellant has tried to distinguish the case at bar from the *Scripto* case. But unlike the *Miller Bros.* case, supra, appellant conclusively knew that the fuel was going to Idaho for use and disposal. The distinguishing factor of the *Miller Bros.* case was the lack of knowledge on the part of the seller as to where the goods were going. Moreover, unlike both the *Scripto* and *Miller Bros.* cases, the facts show appellant actually was doing business in the state. The real intent of the parties conclusively has been shown that they purchased gasoline for use on the Idaho highways.

Appellant also complains that the Idaho statute controls importation of gasoline into Idaho as a privilege of engaging in interstate commerce (p. 7, appellant's Brief). Idaho Code Section 49-1201 (1) (2) taxes only that gasoline for distribution or sale within the state. A so-called "dealer" is the only person in position to have under his control the distribution of the fuel so defined under the Act. Thus the immediate burden of collecting and paying for the construction and maintenance of the Idaho highways is upon him. The Idaho Court so found. *American Oil Co. v. Neill*, 86 Idaho ____, 383 P.2d 350, 360.

C. The issue of the Interstate Commerce Clause has no application in this case.

The power of a state to tax the use or disposal of gasoline within its boundaries as compensation for the use

of its highways is an important power, and one that is not lightly to be denied, *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177; *Kane v. New Jersey*, 242 U.S. 160. A non-discriminatory toll or assessment levied for highway purposes against all who use the highway cannot be invalid under the Commerce Clause. This is true even though the business might be wholly within interstate commerce. *Aero Mayflower Transit Co. v. Comm'rs*, 332 U.S. 495; *Clark v. Poor*, 274 U.S. 554; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86; *Kane v. New Jersey*, supra; *and Bingman v. Golden Eagle Western Lines, Inc.*, 297 U.S. 626. In the *Bingman* case, supra, the Court held that a tax levied on interstate and intrastate commerce equally was valid where the tax was for the use of the state's highways.

In *Aero Mayflower Transit Co. v. Comm'rs*, supra, the Court held that a fixed flat fee tax for highway purposes exacted from all users was valid even though the plaintiff was exclusively engaged in interstate commerce. The tax was not a condition precedent to doing business in the state and was levied upon all who travel. The Commerce Clause therefore did not prevent its enforcement.

Appellant, who has the burden of proof, has not offered any evidence that the tax imposed by Idaho is discriminatory but argues at best that the tax is a direct tax on interstate commerce or a privilege of doing business (p. 12 of appellant's brief).

Appellant cites *Adams Mfg. Co. v. Storen*, 304 U.S. 307; *Robbins v. Shelby County Taxing District*, 120 U.S. 489; *Spector Motor Service v. O'Connor*, 340 U.S. 602; and *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (p.

12 of appellant's brief). These are cases involving double taxation. Such an issue is foreign to the case at bar. The issue of double taxation was not raised below and can not be considered on appeal. The appellant has argued in its brief (page 12) that interstate commerce would be subject to a double tax burden. However, by the contract Utah's gasoline tax is excluded (R. 250, 260). If Utah does not tax, as it has not in this situation, and Idaho, according to the appellant, cannot either, then we have the problem not of double taxation but of no taxation. The appellant's real argument is that it does not want to pay taxes at all. The Commerce Clause is not designed to shield the appellant from paying taxes. Thus the problem of multiple taxation and discrimination is not an issue.

This Court recently struck down arguments which, if sustained, would have placed contractors with the United States or firms using federal property at a distinct advantage by being exempted from state taxation, *City of Detroit v. Murray Corp.*, 355 U.S. 489; *United States v. Township of Muskegon*, 355 U.S. 484; *United States v. City of Detroit*, 355 U.S. 466.

A tax is non-discriminatory where it falls equally upon all who do business within the state, where it is not a condition upon doing business within the state, or where the tax is compensation for a benefit given to interstate commerce. There need only be a reasonable relationship between the tax assessed and the use of the highway, *Capitol Greyhound Lines v. Brice*, 339 U.S. 542; *Aero Mayflower Transit Co. v. Comm'rs*, 332 U.S. 495; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86; *Clark v. Poor*,

274 U.S. 544; *Kane v. New Jersey*, 242 U.S. 160; *Clark v. Paul Gray Inc.*, 306 U.S. 583. Interstate commerce must pay its fair share, *Aero Mayflower Transit Co. v. Comm'rs*, supra.

Appellant urges the proposition that "where a taxpayer is engaged in both interstate and intrastate business, it is not subject to direct taxation of its interstate activities, citing cases)", (p. 12 of appellant's brief). This is far too broad and cannot be supported by the cases cited by the appellant or otherwise. *Norton Co. v. Dept. of Revenue*, 340 U.S. 535; *Spector Motor Service v. O'Connor*, 340 U.S. 602; and *Adams Mfg. Co. v. Storen*, 304 U.S. 307, are not in point because they are not cases dealing with gasoline but instead with taxes which have their own special vice, such as an occupation tax, excise tax on the franchise, and the like. These taxes extract from the business a part of the earnings without any apportionment or reasonable basis for what the state does in return. *Robbins v. Shelby Taxing District*, 120 U.S. 489, also cited by appellant, is limited on its facts by *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 56-57.

The tax imposed by the State of Idaho is not new or novel but has been sustained in principal by numerous cases, *Gregg Dying Co. v. Query*, 286 U.S. 472; *Aero Mayflower Transit Co. v. Comm'rs*, 332 U.S. 495; *Monomotor Oil Co. v. Johnson*, 292 U.S. 86; *Capital Greyhound Lines v. Brice*, supra; *Clark v. Poor*, supra.

Appellant presents no new federal question. This tax is equally on all who use the highway and the tax per gallon is a reasonable basis for determining the amount

of fee due to the State in relation to the use of the highway. The tax does not impose a condition to doing business nor will it subject any person taxed to multiple burdens.

D. The issue of governmental immunity is correctly decided by the lower court.

The power to tax is basic to the sovereignty of the states. Where the tax is only incidental to the function of the federal government, the state power will remain undisturbed. The mere incident of increased cost to the government does not invalidate the state power. *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; *Alabama v. King & Boozer*, 314 U.S. 1; *Curry v. United States*, 314 U.S. 14; *City of Detroit v. Murray Corp.*, 355 U.S. 489; *United States v. Township of Muskegon*, 355 U.S. 484; *United States v. City of Detroit*, 355 U.S. 466; *James v. Dravo Construction Co.*, 302 U.S. 134; *Silas Mason Co. v. Tax Commission*, 302 U.S. 186; *Alward v. Johnson*, 282 U.S. 509; *Trinityfarm Construction Co. v. Gros Jean*, 291 U.S. 466.

The recent cases of *City of Detroit v. Murray Corp.*, *United States v. Township of Muskegon*, *United States v. City of Detroit*, all supra, are adverse to appellant's contention that it is cloaked, by derivative action, with the immunity of the United States. In *United States v. City of Detroit*, supra, a real property tax was held proper. The fact that there was an increased cost to the government was of no concern, since the taxing power was held to be an incident of two sovereigns acting within their respective spheres. This Court noted also that by this tax,

the lessee was required to pay no greater tax than that placed on others similarly situated. Without such equalization, the Court said there would be a "distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility." (355 U.S. 456, 474)

In *City of Detroit v. Murray Corp.* and *United States v. Township of Muskegon*, both supra, a personal property tax on the use of governmental property was held valid. The economic burden to the United States was held to be remote, and the tax equal upon everyone.

Alabama v. King & Boozer, 314 U.S. 1, held that a state had authority to levy a sales tax on an independent contractor who purchased goods for governmental projects. The decision overrules prior cases such as *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218. See *Curry v. United States*, supra; *James v. Dravo Construction Co.*, supra; and *Esso Standard Oil Co. v. Evans*, supra.

The appellant urges *United States v. Livingston*, 179 F.Supp. 9 (E.D. S.C.) affirmed 364 U.S. 281, where DuPont by an elaborate contract with the AEC was made in effect part and parcel of the AEC. DuPont was paid only one dollar above costs each year. The company therefore had absolutely no chance to incur any gain or loss. All goods purchased were found to be integrated as if by the AEC itself, as distinguished from the other cases where goods are purchased by a contractor in the performance of its contract for the AEC or other instrumentality.

The *Livingston* case readily is distinguished from the case at bar. First, the *Livingston* case involved a property

tax which is peculiar to a general governmental function. Idaho's tax involves gasoline. Second, the *Livingston* case is not against the proposition that the AEC must pay for all services performed or materials supplied, and instead that case affirms the position of the State of Idaho. In the case at bar, it does not make any difference whether the services and materials are categorized as "goods supplied" or as "utilities," still the AEC or its contractor must pay for the use and enjoyment thereof. The *Livingston* case involves a question of taxation. The case at bar involves a commodity, namely the construction and maintenance of highways.

Also cited is *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, where it was held that a gross receipts tax did not apply to a purchase by government contractors. The gross receipts tax was a tax directly upon the United States. Such funds collected were for the local support of the government. This case did not involve gasoline or the use of services or materials in the construction and maintenance of highways.

The *Kern-Limerick* case has not met with much approval. The *Detroit* cases completely ignored it in the majority opinions. The fact that the United States is the purchaser of the goods does not control especially where the tax is indirect, *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253; *S.R.A. v. Minnesota*, 327 U.S. 558; and *Esso Standard Oil Co. v. Evans*, 345 U.S. 495.

Also for the above reasons, *United States v. County of Allegheny*, 322 U.S. 174 is not applicable to the case at bar.

E. The action by appellant, as well as the governmental agency, amounts to discrimination.

The Atomic Energy Act consents to taxation. The Act, and particularly 68 Stat. 952, 42 U.S.C. 2208, provides that the AEC shall make payments in lieu of taxes on acquired property and also payments shall be made in instances of special burdens to a state by reason of its governmental activities.

It is the intent of Congress to have its laws applied uniformly. Equality of burdens or rights is the lode star of legislation. Payments in lieu of taxes are to be uniform nationwide. *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204.

The basic philosophy of "payment in lieu of taxes" is found in the Atomic Energy Act and is patterned after the Tennessee Valley Authority Act.

The original TVA Act of 1933 allowed payment in lieu of taxes to only two states, but Congress thereafter realized the detriment to other states and broadened the statute to include all other states affected. See Senate Report 1310, on S. 2938, 76th Cong. 3rd Sess. The intent, according to the report, was to provide payments to other states and not to have discrimination among the several states. See also the Defense Housing Act, 54 Stat. 1127, as amended, 42 U.S.C. 1546. In the second opinion of the *New Castle* case, the Court held that payments were mandatory. *Mayor and Council of New Castle v. United States* (D.C. Del.), 162 F. Supp. 59 and 243.

Committee hearings and reports plainly show Congress is concerned with the loss of revenue to the states. See

Hearing before the Joint Committee on Atomic Energy, 82nd Cong., 2nd Sess. and Senate Report No. 694, 83rd Cong., 1st Sess.

The record of the case at bar is clear that the contracts for the purchase and use of gasoline for the AEC project in Idaho originally called for the payment of the state gasoline tax as required by the two decisions of the Comptroller General (R. 74 and 78). The very minor change in the 1959 contract resulted in discrimination against the State of Idaho. The contract provides for the payment of taxes in Idaho (R. 252), Oregon (R. 282) and Washington (R. 302) but the appellant argues that in one transaction alone it need not pay the "tax" or charge. Yet in all other transactions it pays the tax including a tax on gasoline consumed at the AEC works at Hanford, Washington (R. 309 and 320). In other transactions, excluding the sale of gas to the AEC in Idaho, the United States is paying the so-called tax in accordance with the Comptroller's Opinion (R. 74 and 78).

There is also discrimination within the State. Appellant argues that it should not be required to pay the so-called tax to Idaho where it sold the gasoline to the AEC but by contract, it does pay taxes on the gasoline sold to all other governmental agencies within the state.

It is inconceivable that any governmental agency would condone pin point discrimination. To have the state supply a commodity gratis for one locality at the expense of its other localities and residents is preposterous.

Congress does not intend that the government may pick and choose arbitrarily to whom it will or will not pay

taxes. By paying taxes in the one state, Washington, the United States has no grounds to complain that appellant must pay to other states as well (R. 252, 282 and 302). Congress has so ruled. Moreover, the United States has recognized that payment of taxes to the states is required.

SUMMARY

1. This matter improperly is taken as an appeal. The validity of the Idaho Statute has not been questioned. Instead, appellant complains about the levy made under the statute, and not otherwise.

2. All so-called gasoline tax monies collected by Idaho are used solely for road purposes.

3. Appellant and the agencies to whom appellant supplies gasoline are consuming a commodity, namely the construction and maintenance of Idaho highways; but by this suit, they are attempting to avoid payment therefore. Such action is unlawful.

4. The privilege herein imparted occurred entirely within Idaho.

5. Where all parties knew the gasoline was for Idaho and the appellant was doing business in Idaho, sufficient nexus exists to make appellant a collector of the revenue.

6. Interstate commerce must pay its fair share where the fee is required non-discriminatory.

7. The AEC has given its consent to be taxed.

8. Congress does not intend that any agency may discriminate against the states by arbitrarily picking and choosing among the states or among the agencies within the state which payments in lieu of taxes will be made. Either the agency shall pay the tax, or make payments in lieu of taxes.

CONCLUSION

WHEREFORE, appellees respectfully pray that this Court refuse to note jurisdiction of this cause, and the whole thereof, that appellees' hereinabove motion to dismiss be granted.

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APPENDIX

The pertinent portion of the Idaho Constitution (I Idaho Code 174) is as follows:

Article VII,

* * *

§ 17. *Gasoline taxes and motor vehicle registration fees to be expended on highways.*—On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

The pertinent portions of the Idaho Code, as amended, 7A Idaho Code 40-2210; 9 Idaho Code 49-1210(d), 49-1212 and 49-1241 are as follows:

40-2210. *State highway fund—Creation.*—For the purpose of carrying out the provisions of this chapter, there is hereby created in the office of the state treasurer a separate fund to be known as the state highway fund, which fund shall include:

1. All moneys received and paid over, as hereinafter

provided, by the department of law enforcement and the county treasurers of the various counties for the registration and licensing of motor vehicles and dealers and manufacturers of motor vehicles, as hereinafter provided.

2. All fines, penalties and forfeitures incurred and collected for violations of the provisions of this chapter, as hereinafter provided.

3. All donations to the state from any source for the construction and improvement of highways.

4. All funds received from local boards under joint contracts for the construction of state highways, as hereinbefore in this act provided; and,

5. Other funds which have heretofore and may hereafter be provided by law for the construction and improvement of state highways.

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* * *

(d) All moneys received from one cent of the six cents per gallon tax herein provided for shall be placed in the state highway fund to be used only for the purpose of matching federal funds for the construction, maintenance, improvement and reconstruction, of highways and farm to market roads in the state of Idaho, as provided for in federal acts.

49-1212. *Time of payment of excise tax—Distribution of proceeds—Refunds.*—Said excise tax shall be paid on or before the twenty-fifth day of each month, beginning with the first calendar month after this act becomes effective, to the collector who shall receipt the dealer there-

for, and promptly turn over the same to the state treasurer as are the other receipts of his office and the state treasurer shall place the same in the following funds, to-wit:

(a). Such sum or sums as may have been collected as tax on motor fuels sold for or used in aeroplanes shall be placed in the state aeronautics fund;

(b). An amount equal to twenty per cent of the balance of all such sum or sums as may have been collected shall be placed in the state highway treasury note redemption fund, under the provisions of chapter 3 of the Session Laws of 1929, Extraordinary Session;

(c). An amount equal to fifteen per cent of the balance of all such sum or sums as may have been collected shall be placed in the motor fuels refund fund, which is hereby created for the purpose of paying refunds under the provisions of this act. Any moneys over and above the sum of $150,000.00 remaining in said fund on the 30th day of June of each year, shall be paid into and credited to the state highway fund and the state auditor is hereby authorized to make such transfer.

(d). The balance of all such sum or sums as may have been collected shall be paid into and credited to the state highway fund.

49-1241. *Disposition of funds.*—All taxes, interest and penalties collected under this act shall be turned over promptly to the state treasurer and the state treasurer shall place the same to the credit of the state highway fund.

The pertinent portion of the Atomic Energy Act 1954, 68 Stat. 952, 42 U.S.C. 2208, is as follows:

Payment in Lieu of Taxes.

In order to render financial assistance to those State and localities in which the activities of the Commissio are carried on, and in which the Commission has acquire property previously subject to State and local taxation the Commission is authorized to make payments to Stat and local governments in lieu of property taxes. Such payments may be in the amounts at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State and local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment.